United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-1422

To be argued by
RICHARD A. GREENBERG

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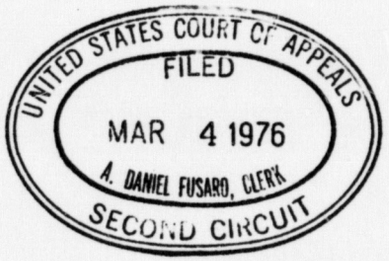
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- WALTER SWIDERSKI, Appellant.	Docket No. 75-1422

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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WHILE A TRIAL JUDGE MAY NOT BE REQUIRED IN EVERY CASE TO INSTRUCT THE JURY THAT A PAID INFORMER'S TESTIMONY MUST BE CLOSELY SCRUTINIZED, SUCH AN INSTRUCTION WAS REQUIRED IN THIS CASE.*

The Government, in its brief, relies heavily on United States v. Becker, 62 F.2d 1007, 1009 (2d Cir. 1933), and its progeny, for the proposition that "cautioning a jury particularly to scrutinize the testimony of an accomplice or in-

*Answering Point I-A, Government's Brief at 13-19.

former is never an absolute necessity and that the question of whether or not such instruction is given 'is at most merely a part of the general conduct of the trial, over which the judge's powers are discretionary'" (Government's Brief at 14). What the Government has failed to mention, however, is that in Becker, this Court also recognized that the special charge on informer or accomplice testimony is "usually desirable" and "in close cases it may turn the scale." Id., 62 F.2d at 1009. In subsequent cases, cited by the Government, this Court has continued to note that it would be the "better course" to give the instruction (see, e.g., United States v. Santana, 503 F.2d 710, 716 (2d Cir.), cert. denied, 419 U.S. 1053 (1974)), even where, unlike here, the instruction was not requested. United States v. Abrams, 427 F.2d 86, 90-91 (2d Cir.), cert. denied, 400 U.S. 832 (1970). Indeed, in Santana, a case cited by the Government, the trial court in fact instructed the jurors that the testimony of accomplices* should be subjected to "close and searching scrutiny" (503 F.2d at 715), which is all that was requested here. It was only the further instruction, not contended for here, that the jurors should scrutinize the testimony of accomplices in terms of their possible motivations rather than simply their records and activities, that

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*Appellant agrees with the Government's contention, found in the footnote on page 14 of its brief, that there is no logical basis for distinguishing between a so-called accomplice charge and one concerning informant testimony.

this Court felt was not critical to give. Even still, this Court noted that it would have been the "better course" to have given the more elaborate charge. Id., 503 F.2d at 716.

Moreover, despite the Government's effort to demonstrate that the informer's testimony here was corroborated (Government's Brief at 15-16), the fact remains that the essence of the Government's case and appellant's defense was the course of events which took place in Carlton Bush's apartment, and the Government's evidence as to those events was largely or entirely uncorroborated. The prosecutor at trial recognized this himself when he told the jury:

> The character of [the informer] may be central to this case.... His testimony is the only testimony that can tell you what happened in that apartment.
>
> (T.14). Emphasis added.

In this context, it is totally illogical, conclusory, and bootstrapping for the Government now to contend that "[t]o the extent rejected by the jury as incredible, the defendants' 'innocent' explanations for the presence of one ounce of cocaine and more than $5,000 in cash in their possession reinforced Davis' testimony" (Government's Brief at 16). The point is that, had the jury been given the cautionary instruction on Davis' testimony to which appellant was entitled, the jury might have rejected Davis' testimony and acquitted appellant. The jury's verdict without benefit of that instruction cannot be used to justify the failure to give it in the first

place.

Finally, the Government's bald assertion that "any claimed imbalance in the trial court's treatment of defendants' credibility as witnesses, on the one hand, and that of informant Davis, on the other, was wholly erased by Judge Bonsal's supplementary specific admonition to the jurors that they should "think about whether Mr. Davis had an interest in testifying" (Government's Brief at 18), is simply unpersuasive. In contrast to the pointed manner in which the trial court singled out the credibility of the defendants ("Obviously they have an extremely important interest here in testifying and that is a factor, their interest, you [the jury] may consider"), its off-handed treatment of Davis' credibility, almost as an afterthought, could not possibly rectify the balance. As was said in United States v. Reid, 410 F.2d 1223, 1227 (7th Cir. 1969):

> [T]he credibility issue was indeed the whole case. Therefore, it was essential for the trial judge to present evenly balanced instructions as to the possible bias of both Government and defense witnesses. The question is "whether it can fairly be said that the instruction singles out or unmistakably refers or draws attention to" the defendant.

That question, as in Reid, can only be answered in the affirmative.

CONCLUSION

For the foregoing reasons and the reasons argued in the main brief for appellant, the judgment of the District Court should be reversed and the indictment dismissed or a new trial ordered.

Respectfully submitted,

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March , 1976

CERTIFICATE OF SERVICE

Mar. 4, 1976

I certify that a copy of this reply brief [redacted] has been mailed to the United States Attorney for the Southern District of New York.